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# Working on the "Mommy-Track": Motherhood and Women Lawyers

Rebecca Korzec\*

## INTRODUCTION

In a 1988 article, Professor Marina Angel made the following observation about women lawyers and motherhood:

Most people want children but most male lawyers have them and most female lawyers don't. Ours is not a society that is supportive of working women with children. Early studies showed that women lawyers did not have children or, if they did, they left the workplace or gravitated to jobs with less stringent work hours.<sup>1</sup>

Nearly ten years later, the situation remains much the same. Childrearing continues to be viewed primarily as "mother's work" even if "mother" happens to be a lawyer. This view of childrearing has deprived women of the opportunities which are essential to achieving equality at work. Consequently, motherhood, actual or potential, exacts significant career costs for women lawyers. In the past two decades, a significant number of women have entered the legal profession.<sup>2</sup> However, mere access to the legal profession has not resulted in gender equality for women. Measured in traditional terms, their career success has not equaled that of their male counterparts.<sup>3</sup> Examining the career costs of motherhood may help explain this

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1. Marina Angel, *Women in Legal Education: What It's Like to be a Part of a Perpetual First Wave, Or the Case of the Disappearing Women*, 61 TEMP. L.Q. 799, 837 (1988).

2. Barbara A. Curran & Clara N. Carson, *Supplement to The Lawyer Statistical Report: The U.S. Legal Profession in 1988* (1991). See also ILLINOIS TASK FORCE ON GENDER BIAS IN THE COURTS, 1990 REPORT OF THE ILLINOIS TASK FORCE ON GENDER BIAS IN THE COURTS 218-24 (1990).

3. Janet Taber et al., Project, *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209, 1222-24 (1988). Recent studies also indicate that women law professors fail to attain positions at the most prestigious law schools. Robert Boothwick & Jordan Schau, *Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors*, 25 U. MICH. J.L. REF. 191, 199-212 (1991). See also Deborah J. Merritt et al., *Family, Place and Career:*

disparity in the professional successes of men and women.

As more women entered the legal profession in the 1980s and 1990s, they began to wonder if they could indeed "have it all" — that is, whether they could simultaneously create successful careers and build happy families. For many, the conflict between mothering and lawyering has been dramatic. Traditional lawyering demands extensive time commitments, far exceeding the forty hour work week. This requirement competes with the demands of caring for young children, thereby placing women lawyers in an unenviable position: awkwardly balanced between home and office.

Childrearing exacts both economic and non-economic costs. On the one hand, rearing a child requires a finite amount of money which is earned by working a defined number of hours.<sup>4</sup> It also requires many more hours of mental and physical work: planning, housekeeping, caretaking and nurturing. These functions are still generally provided directly or indirectly by women. Motherhood thus complicates women lawyers' daily lives in numerous ways: pregnancy disability, maternity leave, childcare concerns, and the demanding "second shift" of housework at the end of the traditional work day.<sup>5</sup>

The fact that women are the primary nurturers of most children has a profound impact on those children as adults and, through them, upon gender relations in the office and the academy.<sup>6</sup> Scholars have questioned whether this fact necessarily follows from the undeniable reality that women give birth and that children require a long period of care before maturation.<sup>7</sup> Feminists continue to debate whether it is desirable that childrearing and nurturing be performed primarily by women, as well as whether it is inevi-

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*The Gender Paradox in Law School Hiring*, 1993 WIS. L. REV. 395 (1993) (arguing that perceived family and geographic limitations do not explain the failure of women to obtain positions at the nation's most prestigious law schools).

4. Lenore J. Weitzmann, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1235-37 (1981) (discussing the work of economist Thomas Espenshade, who calculated the direct costs of supporting a child until age 18 in a moderate-income 1980 family to be \$85,163).

5. The term "second shift" refers to the phenomenon of women employed outside the home performing most childrearing and housekeeping responsibilities. See Milton C. Regan, Jr., *Divorce Reform and the Legacy of Gender*, 90 MICH. L. REV. 1453, 1459 (1992) (stating that most married couples have children, and women still overwhelmingly assume primary responsibility for the care of those children).

6. See generally NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING* (1978); DOROTHY DINNERSTEIN, *THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENT AND HUMAN MALAISE* (1976); Christine Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988). MARGIT EICHLER, *THE DOUBLE STANDARD: A FEMINIST CRITIQUE OF FEMINIST SOCIAL SCIENCE* 118 (1992), quoted in Kathleen A. Lahey, . . . *Until Women Themselves Have Told All They Have to Tell . . .*, 23 OSGOODE HALL L.J. 519, 524 (1985).

7. See CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982); Margaret Mahler, *On the First Three Subphases of the Separation-Individuation Process*, 1972 INT'L J. PSYCHOANALYSIS 53, 333 (1972).

table that motherhood should entail significant career consequences for women.<sup>8</sup> One conclusion seems certain: the legal, economic and social devaluation of childrearing adversely affects women in the professions. Is childrearing undervalued because it is traditionally "women's work," or is it "women's work" because it is undervalued? Notwithstanding its perceived inferior status, women may value the opportunities and responsibilities of childrearing with an intensity not supported by the workplace system.<sup>9</sup>

Some feminists have theorized that this work/family dilemma could be ameliorated by fundamental changes in the gendered nature of family responsibilities.<sup>10</sup> Others have suggested that women lawyers could lead the transformation of their profession from traditional "male" norms to a more caring, humane structure.<sup>11</sup> Some women lawyers have taken what they believed to be a pragmatic approach to the career/family dichotomy by resorting to the "mommy-track": working part-time or leaving their law practices altogether for a period in order to devote substantial time and energy to childrearing.<sup>12</sup>

This Article examines the effects of motherhood on the careers of women lawyers and the efficacy of the "mommy-track" as a means of ameliorating these effects. Part I examines the current position of women in the legal profession. Part II examines the nature of "motherhood" and the risk/benefit function of "mommy-tracking." Part III analyzes the "mommy-track" from the perspective of feminist jurisprudence.<sup>13</sup> Finally, part IV

8. See generally KAREN BERGER MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA, 1638 TO PRESENT* (1986); Mary Jo Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, B.U. L. REV. 55 (1979).

9. See, e.g., CHODOROW, *supra* note 6; GILLIGAN, *supra* note 7; Frug, *supra* note 8.

10. See, e.g., Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

11. Carrie Menkel-Meadow, *Portia in a Different Voice: Speculation on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985).

12. See *infra* p. 121 for a fuller discussion of the term "mommy-track." In a technical sense, leaving practice altogether for a period of time is called "sequencing." See, e.g., Sara Rimer, *Sequencers: Putting Careers on Hold*, N.Y. TIMES, Sept. 23, 1988, at A21. In this Article, however, I refer to all work decisions by a mother/lawyer to place childrearing ahead of professional advancement as "mommy-tracking."

13. This includes radical feminists, cultural feminists, and accommodation feminists. Deborah Rhode has underscored that while the various feminist theories

differ widely in other respects, these theories share three central commitments. On a political level, they seek to promote equality between women and men. On a substantive level, feminist critical frameworks make gender the focus of analysis; their aim is to reconstitute legal practices that have excluded, devalued, or undermined women's concerns. On a methodological level, these frameworks aspire to describe the world in ways that correspond to women's experiences and that identify the fundamental social transformations necessary for full equality between the sexes.

Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 619 (1990). See also Leslie Bender, *From Gender Difference to Feminist Solidarity*, 15 VT. L. REV. 1 (1990).

examines issues related to workplace transformation. It is the position of this paper that "mommy-tracking" reinforces undesirable stereotypes. Ironically, this apparent "solution" actually forestalls the transformations, at home and at work, which could enable women to choose both motherhood and career. Thus, "mommy-tracking" both results from and perpetuates gender inequality because women, unlike men, still pay the cost of parenthood with their careers.

## I. THE CURRENT POSITION OF WOMEN IN THE LEGAL PROFESSION

Although the number of women lawyers has increased dramatically, the achievements of women measured in traditional terms are disappointing.<sup>14</sup> In 1988, the American Bar Foundation published a periodic statistical report on the demography of the United States lawyer population.<sup>15</sup> Women began entering the legal profession in significant numbers in the 1970s. In 1971, five percent of lawyers admitted to the bar were women.<sup>16</sup> By 1987, thirty-six percent of new admittees were women.<sup>17</sup> Nevertheless, a higher proportion of male lawyers continued to be employed in private practice. In 1988, almost 75% of men were in private practice, compared to about 65% of women.<sup>18</sup> Significantly, as late as 1988, 65% of all law firms were still all male.<sup>19</sup>

An explanation of this phenomenon may be found in the 1988 report of the ABA Commission on Women in the Profession.<sup>20</sup> The report concludes that female lawyers face discrimination in law firms in a number of aspects. This discrimination includes the absence of mentoring relationships, assignments to subsidiary roles in cases, exclusion from firm discussions and professional socialization, a lack of responsiveness to the necessity of meeting domestic caretaking responsibilities, and the requirement of billing some twenty-five hundred hours per year.<sup>21</sup>

These disadvantages translate into lower earnings for women lawyers at all levels. The most recent ABA report indicates that as of 1994 the statistics are just as dismal.<sup>22</sup> For lawyers who have been in practice for one to

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14. Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163, 1178 (1988).

15. See Curran & Carson, *supra* note 2, at 2, 7, and 14.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. A.B.A. COMM. ON WOMEN IN THE PROFESSION, REPORT TO THE HOUSE OF DELEGATES (1988).

21. *Id.* at 11-16.

22. A.B.A. REPORT, UNFINISHED BUSINESS: OVERCOMING THE SISYPHUS FACTOR (1995).

three years, women earn \$30,806, while men earn \$37,500.<sup>23</sup> Women serving as general counsel earn average salaries of \$152,000 compared to men's \$205,000.<sup>24</sup> Although women lawyers comprised 37% of all lawyers admitted to practice between 1985 and 1994, only 13% were law firm partners.<sup>25</sup> Even in government, an environment viewed as more accepting of women, only 18.5% of women lawyers, compared to 25.1% of their male colleagues, hold supervisory positions.<sup>26</sup> Moreover, women lawyers who are also wives and mothers still bear primary responsibility for homemaking and childrearing.<sup>27</sup> As a consequence, a significantly disproportionate number of women lawyers who attain traditional success as partners, judges or full professors are unmarried or childless.

## II. MOTHERHOOD AND "THE MOMMY-TRACK"

### A. MOTHERHOOD

Whether married or single, heterosexual or lesbian, young or old, society defines women in terms of their potential for motherhood—all women are considered either mothers or potential mothers. Marilyn French explains this concept as follows: "Women may not be identified as mothers, for not all women are or want to be mothers. But women-as-a-caste behave as they do because most are mothers."<sup>28</sup>

In evaluating the effects of "mommy-tracking," it is important to distinguish which outcomes are the result of individual choice and which are institutionally or socially determined. On this issue, we might agree with Justice Holmes that "a page of history is worth a volume of logic."<sup>29</sup>

The organization of American family life reflects the organization of market production. During the colonial period, the family was the basic unit of production. The male head of the household owned the farm or shop which produced most of the goods and services which constituted the economy; his wife and children worked with him. As a result, there was no

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23. *Id.* at 9.

24. *Id.* at 9.

25. *Id.* at 10.

26. *Id.* at 14.

27. See also Angel, *supra* note 1, at 836; JILL ABRAMSON & BARBARA FRANKLIN, WHERE ARE THEY NOW?: THE STORY OF THE WOMEN OF HARVARD LAW 1974 301-07 (1986) (noting that women in the law school class of 1974 abandoned professional opportunities to devote more time to their private lives). In general, societal expectations still direct women to bear primary responsibility for housekeeping and childrearing. See ARLIE HOCHSCHILD, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME 6-10 (1989); THE WORKING GROUP ON THE FAMILY, THE FAMILY: PRESERVING AMERICA'S FUTURE (1986); Proclamation No. 172, 45 Fed. Reg. 58, 325 (1980) (proclamation by President Jimmy Carter that "[w]orking mothers do not shed homemaking and parental responsibilities; they merely add the demands of a job to those of wife and mother").

28. MARILYN FRENCH, THE WAR AGAINST WOMEN 199 (1992).

29. *New York Trust Co. v. Eisner*, 256 U.S. 345, 348 (1921).

clear distinction between household and commercial work.<sup>30</sup> Zillah Eisenstein has emphasized that the private/public sphere dichotomy did not always exist in traditional terms. In pre-capitalist society, for example, the family within the home constituted an economic unit; men, women, and children worked together to produce necessary goods on the farm or in the home. The rise of industrial capitalism brought men into the wage-labor economy – the public sphere – while relegating women to the home, the non-productive private sphere. Eisenstein argues that

[t]he sexual definition of woman as mother keeps her in the home doing unpaid labor and/or enables her to be hired at a lower wage because of her sexual definition of inferiority. During periods of high unemployment, women either do not find jobs or are paid at an even lower rate. The division of labor and society, along gender lines, remains intact even with women in the paid economy. Ideology adjusts to this by defining women as working mothers. And the two jobs get done for less than the price of one.<sup>31</sup>

Nineteenth century industrialization separated the family from the marketplace. Man, as head of the household, moved into the factory and the office; woman's domestic role rose in importance. Under this system, all commercial and household authority belonged to the father. Since he alone was responsible for the support of his children, he alone could determine issues of custody and control. Women, like children and imbeciles, were incapable of exercising authority.<sup>32</sup>

Over the course of the nineteenth century, the birth rate fell from 7.04 to 3.56 children per white woman, child labor laws were passed, and mothers' importance to childrearing was recognized.<sup>33</sup> The courts celebrated the

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30. MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 14-15 (1994).

31. Zillah Eisenstein, *Constructing a Theory of Capitalist Patriarchy and Socialist Feminism*, 7 *INSURGENT SOCIOLOGIST* 3 (1977), reprinted in *WOMEN, CLASS AND THE FEMINIST IMAGINATION: A SOCIOLOGIST-FEMINIST READER* 115 (Karen V. Hansen & Ilene J. Philipson eds., 1990).

32. See generally ANTONIA FRASER, *THE WEAKER VESSEL: WOMEN'S LOT IN SEVENTEENTH-CENTURY ENGLAND* (1984). Moreover, the legal system, through its policy of judicial non-intervention in family life, supported the hierarchical, patriarchal structure of domestic life. See, e.g., Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 *U. MICH. J.L. REF.* 835, 845-55 (1985).

33. MASON, *supra* note 30, at 51-52. Significantly, as late as 1917, the Supreme Court of Virginia underscored the hierarchical, patriarchal nature of marriage by noting that "notwithstanding the advances made by modern women towards political and economic independence of man, it still remains true that the normal woman married to the normal man recognizes the obligation of obedience contained in the meaning of the marriage vow." *Virginia v. Gousuch*, 120 Va. 665, 661-62 (1917). See also NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH CENTURY NEW YORK* 38 (noting that "[m]arriage, after all, was also a social arrangement between the sexes in which the distribution of property was inextricably connected to the allocation of power").

"cult of true womanhood," finding that mothers are "divinely ordained" to control the domestic sphere of childrearing.<sup>34</sup> Women's magazines and the courts created a new standard for maternal care – the care provided by middle-class mothers. This conception of mothering brought with it an emphasis on nurturing children, rather than merely providing basic physical needs. Eventually, this resulted in a shift to a maternal presumption in child custody determinations.

The modern era brought a transformation in family life as mothers entered the workplace in large numbers. In 1970, twenty-five percent of women with children under the age of three worked outside the home; by 1985, the figure had risen to fifty percent.<sup>35</sup> Significant economic and social disruptions led to the dismantling of the family with its traditional gendered roles. Today, most jurisdictions employ a "best interests of the child" standard.<sup>36</sup> The maternal presumption has been replaced by joint custody arrangements which emphasize contact with both biological parents without regard to the realities of actual childrearing.

In her evaluation of motherhood, Adrienne Rich argues that in our society "mothering" is a very different concept from "fathering."<sup>37</sup> Some feminists refer to all nurturing of children as "mothering" even if performed by men. They insist that the term "mothering" more accurately describes the concrete, sometimes monotonous and mundane work performed in caring for children. They also insist that "fathering" connotes something less than child nurturing.<sup>38</sup>

So pervasive is the societal view that the mother-child relationship is based on dependence, caring, responsibility and altruism that it has been offered as an alternative to the contractual paradigm of legal philosophy: man as autonomous and self-interested. Mothering attitudes, it is argued, could transform society.<sup>39</sup> But, it is possible that "mothers themselves may be subtly putting a damper on men's involvement with their children because they are so possessive of their role as primary nurturers."<sup>40</sup>

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Martha Minow has concluded that women were willing to help with the farm work or around the store, while men resisted "women's work" like housekeeping and childrearing. Martha Minow, *Forming Underneath Everything that Grows: Toward a History of Family Law*, 1985 WIS. L. REV. 819, 854-56 (1985).

34. MASON, *supra* note 30, at 30-31.

35. *Id.* at 126.

36. *Id.* at 156. See also Ross A. Thompson, *The Role of the Father After Divorce*, in THE FUTURE OF CHILDREN 210, 216 (1994).

37. ADRIENNE RICH, OF WOMEN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION 12-13 (1976).

38. See, e.g., Susan Rae Peterson, *Against 'Parenting,'* in MOTHERING: ESSAYS IN FEMINIST THEORY 62 (Joyce Trebilcock ed., 1983).

39. Virginia Held, *Mothering Versus Contract*, in BEYOND SELF-INTEREST 287 (Jane J. Mansbridge ed., 1990); Sara Ruddick, *Maternal Thinking*, in MOTHERING: ESSAYS IN FEMINIST THEORY, *supra* note 38, at 213.

40. LOUIS GENEVIE & EVA MARGOLIES, THE MOTHERHOOD REPORT: HOW WOMEN FEEL ABOUT BEING MOTHERS 358 (1987).



Women may fear professional success for a number of reasons. The qualities traditionally associated with the competent attorney, such as assertiveness and single-mindedness, are diametrically opposed to the traditional "feminine" characteristics of passivity, empathy, and domesticity thought to enhance women's desirability as romantic and marital partners. Judith Wallerstein has concluded that "a wife's successful career can pose a major threat if the husband's career does not match hers in status or income," and notes further that among the couples she studied, "the only serious infidelity occurred in the context of a husband's anger at and jealousy of his wife's career."<sup>41</sup> Professional achievement may thus limit marriage possibilities or create strains on ongoing marriages. Women may come to regard achievement as opposed to femininity, and "the anticipation of success, especially in interpersonal competitive situations, can be regarded as a mixed blessing if not an outright threat."<sup>42</sup>

Motherhood issues present particular problems for women lawyers because they are disproportionately younger than men in the profession. Because most women lawyers practicing today were admitted after the 1970s, their demographic profile is different from that of their male counterparts. Male lawyers are distributed over the entire adult life span, while women are likely to be in their thirties and forties, a time when they may be pursuing the dual goals of career and family. Thus, these women stand out in the profession by virtue of their child-bearing age and the fact that so significant a percentage are simultaneously balancing the demands of career and family within a brief window of time. As a result, they need flexible schedules in greater numbers than if they were demographically distributed over a normal life cycle.

Parenting or nurturing by both parents may be more than an issue of fairness and equity for parents — it may be a more humane way to balance public and private sphere demands and opportunities. Feminists respond to this issue in numerous ways. In this aspect of life, as in many, women may speak in a "different" voice. Adrienne Rich argues that motherhood in our patriarchal society has become an institution — a patriarchal construct resulting from and fostering male privilege and misogyny.<sup>43</sup> bell hooks cautions that early feminists did not attribute enough significance to motherhood, thus alienating women, especially poor and non-white women who find themselves receiving appreciation and affirmation only as mothers.<sup>44</sup>

In a different vein, M. Rivka Polatnick argues that "men (as a group)

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41. JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *THE GOOD MARRIAGE: HOW AND WHY LOVE LASTS* 198 (1995).

42. MARTINA S. HORNER, *Toward an Understanding of Achievement-Related Conflicts in Women*, in *THE PSYCHOLOGY OF WOMEN: ONGOING DEBATES* 169, 183 (Mary Roth Walsh ed., 1987).

43. RICH, *supra* note 37, at 12-13.

44. BELL HOOKS, *REVOLUTIONARY PARENTING*, in *FEMINIST THEORY* 133, 133-36 (1984).

don't rear children because they don't *want* to rear children."<sup>45</sup> Polatnick theorizes that men refuse to engage in childrearing because full time child-rearing limits the capacity to engage in other activities, especially earning money. Many writers argue that earning money is important in determining power within the family. "Money is a source of power that supports male dominance in the family . . . . Money belongs to him who earns it, not to she who spends it, since he who earns it may withhold it."<sup>46</sup>

Moreover, occupational or professional status is a major source of social standing in contemporary American society. According to Talcott Parsons:

In a certain sense, the fundamental basis of the family's status is the occupational status of the husband and father. [The wife/mother] is excluded from the struggle for power and prestige in the occupational sphere [while the man's bread winner role] carries with it . . . the primary prestige of achievement, responsibility and authority.<sup>47</sup>

In *Fatherhood: A Sociological Perspective*,<sup>48</sup> Leonard Benson argues that men want women to carry the burden of childrearing so that they can engage in "parental neglect." In other words, "the man can throw himself into his work and still fulfill male obligations at home, mainly because the latter are minimal. . . . [M]en have the luxury of more familial disengagement than women." It has been estimated that a married woman with small children works a minimum of seventy or eighty hours a week.<sup>49</sup> Even when she is not actually taking care of the children, there is the added strain of having to be constantly available to the family both physically and mentally.

Judith Wallerstein identifies "becoming parents" as a characteristic task of a "good marriage."<sup>50</sup> Given its continued relevance in many people's lives, having children should not cost mothers more than it costs fathers. By providing child care and household management, the traditional or "mommy-tracker" wife subsidizes her husband's efforts, enabling him to devote the necessary single-minded focus to his career. Significantly, by excelling in their careers, men actually become *more* highly regarded as fathers.<sup>51</sup> For women, the reverse is often true. The more she excels in a

45. M. Rivka Polatnick, *Why Men Don't Rear Children: A Power Analysis*, in *MOTHERING: ESSAYS IN FEMINIST THEORY*, *supra* note 38, at 21, 23.

46. FAMILY, MARRIAGE, AND PARENTHOOD 790 (Howard Becker & Reuben Hill eds., 1948).

47. Talcott Parsons, *Age and Sexism in the Social Structure*, in *THE FAMILY: ITS STRUCTURE AND FUNCTIONS* 243, 248 (Rose Laub Coser ed., 1964).

48. LEONARD BENSON, *FATHERHOOD: A SOCIOLOGICAL PERSPECTIVE* 293 (1968).

49. Margaret Benston, *The Political Economy of Women's Liberation*, in *ROLES WOMEN PLAY: READINGS TOWARD WOMEN'S LIBERATION* 199 (Michele H. Garskof ed., 1971).

50. See WALLERSTEIN & BLAKESLEE, *supra* note 41, at 72.

51. Jessie Bernard, *The Good Provider: Its Rise and Fall*, in *FAMILY IN TRANSITION: RETHINKING MARRIAGE, SEX, CARING, AND FAMILY ORGANIZATION* 117, 122-23 (Arlene S.

time-consuming career, the more a woman is apt to feel that she is not doing her job as a mother and that she may be harshly judged by others in society as an inferior mother.

Since having children is a shared marital goal, partners should invest to the same extent to achieve this goal. If mothers are forced to invest more, paying for parenthood with their careers, then motherhood leads to discrimination and inequality for women. Traditionally, the work of men and women was divided into two separate, distinct spheres: private and public. Men occupied the public sphere exclusively, not only enabling but requiring women to maintain the private sphere at home. Although the modern American family has undergone changes, in some respects it has not changed at all. Almost a decade ago, Arlie Hochschild coined the term "second shift" to refer to the fact that women in two-career marriages bear overwhelming responsibility for domestic work. In fact, eighty percent of the men in Hochschild's study did not share in child care or housework.<sup>52</sup> This trend holds true for women lawyers as well, heightening the conflict women experience between their professional and personal roles.

Commenting on this situation, Professor Michael S. Kimmel concludes:

[W]omen must choose to put career or family first. 'Having it all' has become a symbol of the modern woman — she can have a glamorous career and a loving family. (Of course, until now men have always 'had it all.' Women have done the homework. Men have had it all because women have not.)<sup>53</sup>

In this sense, women's efforts have subsidized the cost of parenting for men. Men can enjoy the status of parent while remaining "ideal" traditional workers who may devote all efforts to professional advancement. In fact, the joint status of husband and father increases a man's desirability as a worker as he is regarded as more stable and mature than his childless, bachelor counterpart. Conversely, the mere status of motherhood diminishes the value of women employees in the eyes of the employers. Motherhood thus exacts high career costs for women.<sup>54</sup>

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Skolnick & Jerome H. Skolnick eds., 7th ed. 1992).

52. ARLIE HOCHSCHILD WITH ANNE MACHUNG, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* 6-8 (1989).

53. Michael S. Kimmel, *Issues For Men in the 1990s*, 46 U. MIAMI L. REV. 671, 673 (1992).

54. See generally Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047 (1994). See also Nancy E. Dowd, *Family Values and Valuing Families: A Blueprint for Family Leave*, 6 HARV. J. ON LEGIS. 335 (1993).

## B. "MOMMY-TRACK"

## 1. "Mommy-Tracking" and Law Firm Economics

Felice Schwartz coined the term "mommy-tracking" in a 1989 article in the Harvard Business Review. Schwartz suggested that law firms could separate "fast-track" women employees from more family-oriented women who would subordinate career to focus primarily on family. Schwartz argued further that employing women is more costly than employing men, since firms could not recoup their training investments in such workers. From an efficiency point of view, Schwartz advocated the "mommy-track" as an alternative corporate track for women.<sup>55</sup>

"Mommy-tracking" can be viewed as leading to second-class status. In a survey of three thousand women in the nation's largest law firms, sixty-seven percent of the respondents reported that part-time work results in lesser opportunities.<sup>56</sup> Joan Williams predicts that "mommy-tracking" will reinforce exploitation of women by law firms, creating workplaces which are "top-heavy with men and childless women, supported by a pink-collar ghetto of mommy-lawyers" without equity partnership status.<sup>57</sup> Moreover, studies indicate that women lawyers who work part-time suffer in terms of salary, quality assignments and advancement. Thus, they are more likely to suffer from lower self-esteem, to consider leaving and, ultimately, to leave the legal profession.<sup>58</sup>

No-growth or even recessionary environments may make "mommy-tracking" more problematic. Since law firms are basically economic entities, they are more likely to make employee innovations and accommodations which are compelled by workplace realities. Only traditional workers, who are able and willing to work the hours necessary to bill twenty-five hundred hours a year will be considered economically efficient. Under such a risk-benefit analysis, non-traditional lawyers may be forced out of firms

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55. Felice N. Schwartz, *Executives and Organizations: Management Women and the New Facts of Life*, 67 HARV. BUS. REV. 65 (1989). In this context, the term refers to women reducing time commitments or dropping out entirely for a period of time.

56. Emily Couric, *An NLJ/West Survey: Women in the Law: Awaiting Their Turn*, NAT'L. L.J., Dec. 11, 1989, at S2.

57. Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 828 (1989) (quoting Mary C. Hickey, *The Dilemma of Having It All*, WASH. LAW., May-June 1988, at 59). See also Sheila Nielsen, *The Balancing Act: Practical Suggestions for Part-Time Attorneys*, 35 N.Y.L. SCH. L. REV. 369, 382 (1990) ("Some work places are essentially creating ghettos of second class attorneys who are assigned the more tedious and *pro forma* tasks of lawyering."). See also Lorraine Dusky, *Mommy Tracks that Lead Somewhere Good*, WORKING WOMAN, Nov. 1989, at 132; Jennifer A. Kingston, *Women in the Law Say Path Is Limited by 'Mommy-Track'*, N.Y. TIMES, Aug. 8, 1988, at A1 (noting that the average annual number of billable hours is 2300-2500 hours); Geneva Overholser, *So Where's the Daddy-Track?*, N.Y. TIMES, Aug. 25, 1988, at A26.

58. Stacy Caplow & Shira A. Scheindlin, *'Portrait of a Lady': The Woman Lawyer in the 1980s*, 35 N.Y.L. SCH. L. REV. 391, 427 (1990).

altogether. They will find work only as temporary or contractual employees, often toiling without benefits, such as health insurance or retirement plans and without the possibility of job security or advancement.<sup>59</sup>

On the other hand, Judge Judith Kaye views the "mommy-track" as a positive development for women lawyers, in that they can combine motherhood with the benefits of large law firm employment. However, even Judge Kaye worries that the harsh realities of contemporary law firm economics, including high billable hours, economies of scale and "rainmaking" pressures will affect women more than men.<sup>60</sup>

## 2. Family Law Considerations

### a. Custody

An unexpected consequence of forgoing the mommy-track is evident in the context of family law litigation. Judges have not been reluctant to award custody of children to a father whose job is generally as demanding as the mother's.<sup>61</sup> Thus, the separated or divorced mother must carefully consider that special assignment which could greatly benefit her career but seriously jeopardize her status as custodial parent.<sup>62</sup>

Courts have even awarded custody to fathers who work full-time because the part-time working mother has displayed too much interest in her occupation.<sup>63</sup> Sometimes custody is awarded to the father who has remarried, thus providing a stay-at-home stepmother to replace the working biological mother.<sup>64</sup>

### b. Spousal Support

The decision to "mommy-track" is economically feasible only in an ongoing marriage in which the family is supported by other sources of income, most commonly the salary of the bread-winner father. At divorce, the "mommy-tracker" may become an unwitting casualty of family law reform. Given the trend to award maintenance or alimony only for rehabilitative purposes, it is unlikely that a mother will be awarded the post-divorce income necessary to support her decision to "mommy-track." Divorce reform,

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59. Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313 (1985) (noting that firms tend to minimize economic risk).

60. Judith S. Kaye, *Women Lawyers in Big Firms: A Study in Progress Toward Gender Equality*, 57 FORDHAM L. REV. 111, 113-16 (1988).

61. See, e.g., *In re Marriage of Estelle*, 592 S.W.2d 277 (Mo. App. 1979).

62. See Mary Becker, *Maternal Feelings: Myth, Taboo and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 172-83 (1992).

63. See, e.g., *Masek v. Masek*, 228 N.W.2d 334 (N.D. 1975) (awarding custody to father of children whose mother taught music part-time).

64. Nancy D. Polikoff, *Why Are Mothers Losing?: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 241 (1982).

with its emphasis on self-reliance and autonomy, is likely to deny the "mommy-tracker" extended spousal support because laws governing such support are premised on an inability to be self-supporting.<sup>65</sup>

Moreover, with the shift from fault-based to no-fault divorce, courts tend to award rehabilitative rather than permanent alimony or maintenance. Women lawyers probably will be viewed as self-sufficient. As a result, they are unlikely to have their caretaking contributions compensated or recognized in an economic sense. Divorce may well leave them in economic peril. Single parenthood can lead to further economic disadvantage.<sup>66</sup>

### c. Child Support

The choice to "mommy-track" is a decision made by both parents in an ongoing marriage as the appropriate method for meeting both parents' responsibility for caregiving and childrearing. However, when the parents divorce, this joint decision is viewed by the court as the mother's individual lifestyle preference, undeserving of post-marital protection. In addition to the general unavailability of post-marital income support, the "mommy-tracker" faces the obligation to provide child support. The child support guidelines in most jurisdictions virtually require both parents to be employed full-time, since they contain no allowance for support of the caregiver parent.<sup>67</sup> As a result of the "divorce revolution," even mothers with young children may be forced to return to the labor force as soon as possible.<sup>68</sup>

### 3. Career Effects

A "mommy-tracker's" absence from the workplace has at least two significant economic costs. First, in the short run, her income is either decreased or entirely eliminated during the finite period of work absence or reduction. More dramatic are the permanent, non-recoverable losses in lifetime earnings which have been estimated to average one-and-a-half percent for each year of absence.<sup>69</sup>

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65. For discussions of the current trends in spousal support and property division and suggestions for reform therein, see MARTHA A. FINEMAN, *THE ILLUSION OF EQUALITY* 173-90 (1991); LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985). See also Jack Gillman, *Alimony/Spousal Support: From Punishment to Rehabilitation*, 7 COMMUNITY PROP. J. 135, 138 (1980); Karen C. Holden & Pamela J. Smock, *The Economic Costs of Marital Dissolution: Why Do Women Bear a Disproportionate Cost?*, 17 ANN. REV. SOC. 52 (1991); Joan M. Krauskopf, *Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery*, 23 FAM. L.Q. 253 (1989); Bianca G. Larson, *Equity and Economics: A Case for Spousal Support*, 8 GOLDEN GATE U. L. REV. 443, 469 (1979).

66. Joan M. Krauskopf, *Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony*, 21 FAM. L.Q. 573, 81-83 (1988).

67. David L. Chambers, *Commentary: Meeting the Financial Needs of Children*, 57 BROOK. L. REV. 769, 772-73 (1991).

68. WEITZMAN, *supra* note 65, at 183-87.

69. Jacob Mincer & Solomon Polachek, *Family Investments in Human Capital: Earn-*

The implications of "mommy-tracking" are negative for a number of reasons. Even the term itself ultimately undercuts and marginalizes women. In effect, the term implies that there are two types of lawyers: traditional or "real" lawyers and mommy lawyers, who are something less than the ideal. In other words, "mommy-trackers" are not serious, committed professionals. Why isn't there a "daddy-track" or even a "parent-track" to accommodate gender neutral responsible parenting within the professions? Not surprisingly, insignificant numbers of new fathers have taken advantage of the parental leave now available to them under the Family and Medical Leave Act of 1993.<sup>70</sup> Traditional cultural mandates insist that men act as the primary breadwinner of the family, and the persistence of these mandates may at least partially explain this result. Some economists have suggested that the traditional gender-based division of labor is an efficient model. For example, Professor Gary Becker has argued that, for biological reasons, women are better suited than men for childrearing, a conclusion that buttresses the economic-efficiency theory.<sup>71</sup>

Even a woman who believes she has adjusted to "mommy-tracking" may eventually become disillusioned with it as a "solution" to the work-family conflict. Initially, these lawyers may be willing to accept reduced income, status and prestige. However, as their hard work goes unrewarded and unrecognized, these lawyers may leave the profession altogether.<sup>72</sup> Finally, on her return to a traditional work schedule, the "mommy-tracker" may have her chances for advancement permanently jeopardized by negative assumptions concerning her priorities, ambitions and work ethic.<sup>73</sup>

#### 4. Child Care

The issue of child care has provoked the concerns of feminists. Rather than offering a "solution" to the work-home conflict of many professional women, child-care, as currently structured, may in fact present additional problems. First, children who attend day-care centers may suffer from higher rates of colds, flu, diarrhea, and hepatitis A. Moreover, their devel-

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*ings of Women*, in *ECONOMICS OF THE FAMILY* 397, 415 (Theodore W. Schultz ed., 1974). See also Laura Meyers, *Women Who Interrupt Careers Fall into Pay Gap*, *BOULDER DAILY CAMERA*, Jan. 11, 1992, at 1A (discussing study by Lawrence Levin and Joyce Jacobsen).

70. 29 U.S.C. §§ 2651-2654; see Malin, *supra*, note 54.

71. GARY BECKER, *A TREATISE ON THE FAMILY* 16 (1981). For criticism of this viewpoint, see Martha A. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789 (1983); June Carbone, *Economics, Feminism and the Re-invention of Alimony, or Why the Desire to Remove Distorting Incentives Does Not a Theory Make*, 43 VAND. L. REV. 1462 (1990).

72. Sheila Nielsen, *The Balancing Act: Practical Suggestions for Part-Time Attorneys*, 35 N.Y.L. SCH. L. REV. 369, 382 (1990).

73. Leslie Shad, *Working Part-Time Without Paying the Penalty*, N.Y. TIMES, Aug. 3, 1990, at B7 (stating that part-time associates may have limited partnership potential). See also Janice Handler, *Diapers and Depositions*, 71 A.B.A. J. 66 (1985).

opment may be affected by requiring them to spend more than eight hours a day away from home, in an institutional setting.<sup>74</sup> In addition, day-care workers are among the lowest paid adult wage earners, which may affect the quality of available services. According to the Children's Defense Fund, two thirds of day-care center workers earn below poverty level wages, and eighty-seven percent of family day-care providers earn below the minimum wage.<sup>75</sup> Finally, women lawyers who can afford to hire nannies may face other conflicts. Some feminists argue that this practice may result in discrimination against poor, foreign and minority women.<sup>76</sup> In short, the variability and expense of available childcare services available continues to impede women's professional advancement.

### III. THE "MOMMY-TRACK" FROM A PERSPECTIVE OF FEMINIST JURISPRUDENCE

Whatever the school or methodology, feminism is fundamentally concerned with empowering women to make choices. One suggestion for improving the "lot" of women lawyers has been that they "mommy-track," that is, that they leave traditional law career paths to devote substantial time and energy to childrearing. But is "mommy-tracking" a valid choice for women? What are the long term implications for a woman's career?

Contemporary studies indicate that women lawyers have good reason for concern. Mothers feel deprived of the privilege of raising their children full time, and are concerned about the quality of child care. On the other hand, staying at home to nurture children may reduce the possibility for attaining a rewarding and challenging career, as measured by traditional standards.<sup>77</sup> Viewed from a feminist perspective, does "mommy-tracking" empower women to choose how and to what extent they will have both career and family?

Feminist jurisprudence and methodology is relatively new,<sup>78</sup> especially

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74. See *Hearings on Childcare: Hearings Before the Subcomm. on Labor-Mgmt. Relations of the House Comm. on Education and Labor*, 100th Cong., 1st Sess. 62-63, 68-70 (1989) (statement of Dr. T. Berry Brazelton). Dr. Brazelton is a professor at Harvard Medical School and has authored several popular books on infant care.

75. RUTH SIDEL, *WOMEN AND CHILDREN LAST* 115-18, 128-30 (1986).

76. RUTH SIDEL, *ON HER OWN* 199-200, (1990). Many of these caregivers are foreign-born, undocumented workers who are employable at or below minimum wage. Sidel argues that "in our extraordinarily materialistic society, children are viewed as things, as commodities around which others can make a profit." *Id.* Paying little to day care workers means that these individuals have little incentive to remain in their jobs or else that day care becomes a "transfer of roles from one group of exploited women—mothers—to another group of exploited women day-care staff." *Id.*

77. See WALLERSTEIN & BLASKESLEE, *supra* note 37, at 158.

78. See, e.g., MATTHEW H. KRAMER, *CRITICAL LEGAL THEORY AND THE CHALLENGE OF FEMINISM* (1994); *FEMINIST LEGAL THEORY: FOUNDATIONS* (D. Kelly Weisberg ed., 1993); *REPRESENTING WOMEN: LAW, LITERATURE, AND FEMINISM* (S. Heinzelman & Zipporah Wiseman eds., 1994). See also *WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL*



when contrasted with traditional, male-dominated analysis.<sup>79</sup> Nevertheless, it is possible to isolate and identify significant feminist schools which share similar concerns and goals that have been addressed inadequately by traditional modes of analysis.

Whatever their disagreements, feminist scholars share two basic approaches and methodologies. First, feminists seek to identify and to include, within traditionally male-dominated areas of discourse, such as law, science, psychology and literary criticism, the previously excluded woman's voice or viewpoint.<sup>80</sup> From a feminist perspective, these disciplines traditionally constructed purportedly neutral and objective rules, standards, and approaches which, in fact, embraced and advanced male norms as the only acceptable standard.<sup>81</sup> Second, feminists recognize and validate women's experiences and viewpoints as centerpieces of a more humane social structure, ultimately benefiting women, men, and children.<sup>82</sup> In this sense, feminism<sup>83</sup> develops unique visions of the world, not only as it actually exists, but also, as it should exist.<sup>84</sup>

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PERSPECTIVES (J. Peters & A. Wolper eds., 1995); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 5-11 (1988).

79. Traditional scholars and scientists may even run the risk of misinterpreting data since they employ different concepts and methods already misunderstood by them. See, e.g., STEPHEN J. GOULD, *WONDERFUL LIFE: THE BURGESS SALE AND THE NATURE OF HISTORY* (1989); Harold A. Herzog, Jr., *The Moral Status of Mice*, AM. PSYCHOLOGIST, June 1988, at 95. Herzog's article attracted widespread attention when it was discussed by David Gelman. See David Gelman, *Of Mice and Men and Morality: Something in a Name*, NEWSWEEK, July 18, 1988, at 65. See also Kathleen A. Lahey & Sarah W. Salter, *Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism*, 23 OSGOOD HALL L.J. 543, 545 (1985) (citing KATHLEEN FERGUSON, *THE FEMINIST CASE AGAINST BUREAUCRACY* (1984)); Ann C. Scales, *The Emergence of a Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986).

80. See generally SIMONE DE BEAUVOIR, *THE SECOND SEX* (12th prtg. 1989) (1953); CAROL GILLIGAN, *supra* note 7; NANCY HARTSOCK, *MONEY, SEX, AND POWER: TOWARD A FEMINIST HISTORICAL MATERIALISM* (1983); EVELYN FOX KELLER, *REFLECTIONS ON GENDER AND SCIENCE* (1985); MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990); ANNE FIROR SCOTT, *MAKING THE INVISIBLE WOMAN VISIBLE* (1984); *ESSAYS ON WOMEN AND LITERATURE* (Elaine Showalter ed., 1985).

81. See, e.g., *AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY* (Martha A. Fineman & Nancy S. Thomadsen eds., 1991).

82. For examples of such criticism see KIM CHERNIN, *THE HUNGRY SELF: WOMEN, EATING AND IDENTITY* (1985); ANN DOUGLAS, *THE FEMINIZATION OF AMERICAN CULTURE* (1988); KATHA POLLITT, *REASONABLE CREATURES* (1994); MICHELE ZIMABALIST RONALDO & LOUISE LAMPHERE, *WOMAN, CULTURE AND SOCIETY* (1974); Mary Gaitskill, *On Not Being a Victim: Sex, Rape, and the Trouble With Following Rules*, HARPER'S, Mar. 1994, at 35.

83. Marilyn French argues that initially feminism must address the more modest, yet equally compelling goal of advancing women's interests. "Feminism has so many forms that many scholars refer to feminisms. I define as 'feminist' any attempt to improve the lot of any group of women through female solidarity and a female perspective." MARILYN FRENCH, *supra* note 28.

84. See, e.g., AM. ASS'N OF UNIVERSITY WOMEN, *EQUITABLE TREATMENT OF GIRLS AND BOYS IN THE CLASSROOM* (1989); JOAN HOFF, *LAW, GENDER AND INJUSTICE* (1991); Dawn Johnsen, *Shared Interests: Promoting Healthy Births Without Sacrificing Women's Liberty*, 43 HASTINGS L.J. 569 (1992); Emma Coleman Jordan, *Race, Gender, and Social*

Carol Gilligan's work embodies two themes, but popular literature has mainly emphasized her message that women speak in a "different" voice, a voice leading to "more advanced, more affiliative ways of living."<sup>85</sup> A more important but largely ignored theme in Gilligan's work stresses that traditional masculinity and traditional femininity warp human potential in that the masculine neglects care of others while the feminine neglects care of self.<sup>86</sup> "Sameness" feminists would agree that institutionalized gender roles distort both men's and women's lives.

Because the term "mommy-track" itself poses a gender-oriented approach, it tends to perpetuate harmful stereotypes about the nature of women. This reinforces identification of women with certain traditionally-defined feminine characteristics and traits, thereby limiting choices for both women and men. Ultimately, then, the "mommy-track" emphasizes a female-male dichotomy which should be rejected by anyone interested in achieving gender equality.

The "mommy-track" solution recalls earlier feminist debates. During the 1970s, feminist jurisprudence attempted to address women's invisibility and exclusion merely by adding "women's issues" to the traditional legal discourse.<sup>87</sup> The resulting "women and the law" approach shaped the development of sex-based discrimination law. Eventually, this assimilationist approach was challenged by proponents of "difference" or "cultural" feminism.

In the 1980s, the feminist focus turned to the differences between men and women. Carol Gilligan's 1982 book *In a Different Voice* became the basis for relational or cultural feminism. In this book, Gilligan argues that women's decision making is characterized by a "different voice," a voice emphasizing relationship, caring, responsibility and nurturance. As a result, the feminine moral imperative of relational caring is opposed to the masculine focus on rights-based justice. Followed to its logical conclusion, the "different voice" analysis requires women to find satisfaction in their nurturing roles, celebrating their differences and rejecting dominant male values.

If the legal profession embodies this rights-based model, if it celebrates the "male" characteristics of autonomy, self-interest and aggressiveness, will women's "different voice" necessarily be silenced and excluded? If women "choose" caretaking over lawyering, are they really "choosing" economic and professional marginalization? Ultimately, the sameness/difference and special treatment/equal treatment debates took center

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*Class in the Thomas Sexual Harassment Hearings: The Hidden Fault Line in Political Discourse*, 15 HARV. WOMEN'S L.J. 1 (1992); Deborah L. Rhode, *Occupational Inequality*, 1988 DUKE L.J. 1207 (1988); Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45 (1990).

85. GILLIGAN, *supra* note 7, at 49.

86. *Id.* at 168-74.

87. Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 846 (1990).

stage.<sup>88</sup> However, some feminists suggest that women may not measure success by male norms. Carrie Menkel-Meadow puts it this way:

Both cultural and more radical feminist critiques remind us that becoming surrogate males is not the feminist-humanist transformative vision. Committing many hours to routinized tasks, within a highly stratified hierarchy, on cases and transactions with debatable social utility, while leaving one's children in the care of low-income women is hardly the feminist vision of a more humane world . . . women want to be in the work place but may want to reconstruct what it means to be a productive worker.<sup>89</sup>

Moreover, feminists who advocate "special treatment" for women in the form of maternity leave and flexible work arrangements may unwittingly duplicate the protective paternalism reminiscent of nineteenth century judges who denied women admission to the bar because women's nature and function did not suit lawyering.<sup>90</sup>

Radical feminists emphasize the power disparities between men and women, rejecting the sameness/difference debate as unproductive. Instead, this school of thought emphasizes gendered hierarchies of dominance and power,<sup>91</sup> or gender disadvantage.<sup>92</sup> Further, radical feminism rejects traditional jurisprudence on all levels. It identifies sex as the cause of woman's oppression and man's power. As MacKinnon views it, "sexuality is to feminism what work is to Marxism: that which is most one's own, yet most taken away."<sup>93</sup> Plainly, radical feminism must reject a work paradigm which includes the "mommy track."

"Mommy-track" choices reflect fundamental conflicts regarding the individual, work, family and their interrelationship with children. Society's goal should seek to transcend the limitations imposed by gender-based allocation of family roles. Society, and the legal profession in particular, must question the context of lawyering and family roles, as well as the structures within which they co-exist.

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88. Heather R. Wishnic, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 BERKELEY WOMEN'S L.J. 64, 67-68 (1986).

89. Carrie Menkel-Meadows, *Exploring a Research Agenda or the Feminization of the Legal Profession: Theories of Gender and Social Change*, 14 L. & SOC. INQUIRY 289, 308 (1989).

90. Cynthia Fuchs Epstein, *Faulty Framework: Consequences of the Difference Model for Women in the Law*, 35 N.Y.L. SCH. L. REV. 309, 317 (1990).

91. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 32-45 (1987).

92. See generally DEBORAH L. RHODE, *JUSTICE AND GENDER* (1989).

93. Catharine A. MacKinnon, *Feminism, Marxism Method and the State: An Agenda for Theory*, 7 SIGNS 515 (1982).

## IV. TRANSFORMING THE WORKPLACE

The contemporary law firm is a problematic work environment for both women and men as it sacrifices the commitments to family, friends, public service and leisure necessary for a truly balanced and productive life. Current studies of the legal profession are rich with lawyers' complaints about job dissatisfaction, lack of professionalism, and high levels of stress.<sup>94</sup> Such disenchantment has resulted in the abuse of alcohol and drugs at a rate notably greater than that of the general population as well as greater stress-related illnesses such as depression.<sup>95</sup> Clearly, this state of affairs is detrimental to clients as well as lawyers.

As previously discussed, traditional legal analysis fostered discrimination against women by relegating them to the private sphere of the home, while men entered the public sphere of work. Nancy E. Dowd has examined the traditional dichotomy between work and family and has concluded that society should prefer neither public nor private, workplace nor home, but should restructure the relationship between family and work.<sup>96</sup> Women lawyers with children should not be perceived as uncommitted or otherwise unprofessional, but rather as assets to the legal profession. These women may indeed lead a much-needed transformation of the legal profession.

Rand Jack and Dana Crowley Jack, an attorney and a developmental psychologist, respectively, have studied the question of whether women attorneys bring a different viewpoint to the practice of law, and how women reconcile personal values with the conflicting demands of private practice.<sup>97</sup> They conclude that "emotional vulnerability is one reason lawyers erect barriers of detachment and objectivity. The price of involved concern and the anxiety attached to caring may be more than they are able or willing to bear."<sup>98</sup> The Jacks have concluded that care-oriented women attorneys employ a number of different strategies in seeking to integrate professional demands and personal sensibilities (1) emulating "male" norms while denying the "relational self;" (2) "splitting" the self into a detached lawyer at the office and caring self at home; and (3) attempting to reshape the professional role of lawyer to conform to personal values.<sup>99</sup>

These attitudes support Catharine MacKinnon's claim that the role of a

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94. A.B.A. REPORT, AT THE BREAKING POINT: A NATIONAL CONFERENCE ON THE EMERGING CRISIS IN THE QUALITY OF LAWYERS' HEALTH AND LIVES—ITS IMPACT ON LAW FIRMS AND CLIENT SERVICES 3-9 (1991).

95. See MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 87 (1994).

96. See generally, Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.—C.L. L. REV. 79 (1989).

97. RAND JACK & DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISION: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS (1989).

98. *Id.* at 151.

99. *Id.* at 130-51.

successful lawyer as it has traditionally been defined is fundamentally a male role. She states:

Being a lawyer is also substantially more consistent with the content of the male role. With what men are taught to be in the society: ambitious, upwardly striving, capable of hostility, aggressive, not just assertive, not particularly set off from the track of an argument by what someone else might be saying or, god forbid, feeling. It also requires one to be unserious. By that I mean what I think Virginia Woolf meant when she spoke of 'unreal loyalties.' Not being present in what you say in a way that might make you vulnerable, skilled at false and manipulative passion and manufactured intensity. The lawyer role has as its implicit norms the same qualities that are the explicit norms of masculinity as it is socially defined. It is a power role.<sup>100</sup>

In fact, the absence of these same traditionally male traits would enable women to play a substantial role in transforming the profession.

The law's insistence on formal equality as the answer to gender inequality creates many problems. Clients and employers, as well as peers, may react with ambivalence to a "mommy-tracker's" part-time schedule. Male attorneys may view "mommy-trackers" with both disdain and envy. Other women may fear that "different" work arrangements are inimical to equal treatment.<sup>101</sup> If the legal profession is structured so that female lawyers and male lawyers cannot enjoy professional life and parenthood equally, then the profession perpetuates the very gender inequality which disadvantages women.

Firms must adopt gender-neutral models for law practice. Such models would accept the human need for a balanced life that incorporates time for familial as well as professional and social responsibilities. Reducing the current emphasis on excessive hourly billing is a major starting point. For example, firms can adopt alternative billing methods such as fixed fee and value billing. Value billing is a model which accommodates the expertise of counsel, the complexity of the task, and the results achieved, in addition to the time involved. The fixed fee method charges a stated or fixed fee for each particularly defined task. This alternative billing practice is efficient as well as responsive to client demands for cost containment and accountability.<sup>102</sup> For women lawyers who happen also to be mothers, these alterna-

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100. See MACKINNON, *supra* note 91, at 74.

101. Marsha E. Simms, *Women in the Lawyering Workplace: A Practical Perspective*, 35 N.Y.L. SCH. L. REV. 385-88 (1990).

102. See Elizabeth Foster, *The Glass Ceiling in the Legal Profession: Why Do Law Firms Still Have So Few Female Partners?*, 42 UCLA L. REV. 1631, 1681-82 (1995) and Michael L. Beatty & Ronald M. Martin, *A Blueprint for Avoiding Extinction: Ten Steps to Survive into the Millenium*, 20 A.B.A. L. PRAC. MGMT. 24, 27 (May/June 1994) (stating

tives provide a measure of flexibility without the costs that inhere in the "mommy-track" response to law firm demands.

More importantly, law firms must adopt gender-neutral policies for implementing and evaluating part-time work arrangements, including part-time partnership arrangements. Part-time work must be considered a viable option toward promotion. Lawyers who work part-time can normally be expected to return to full-time employment in a short period of time. In fact, Felice Schwartz notes that parents often work intensely for ten years, less intensely for five years, and then resume working intensely for another twenty-five years.<sup>103</sup> Schwartz suggests that firms which provide "flexibility" during this five-year period earn dividends in worker loyalty and productivity.<sup>104</sup> Gender neutral policies that take into consideration these trends promote efficiency while concurrently ensuring equality.

The double bind in which women lawyers find themselves is described as follows by Cynthia Fuchs Epstein, a sociologist who has studied women attorneys for two decades:

It is not only men who monitor gender-appropriate norms. Both feminist-identified and non-feminist women do not conform to behavior and attitudinal femininity norms because they are assertive in the quest for monetary success and insufficiently 'caring' or 'nurturant' in their interpersonal interactions. Women in firms who want to leave early to be with their children have a hard time, but women who stay late are regarded as heartless by the same men who set the standards.

These considerations may explain why women lawyers both voluntarily and involuntarily leave the "fast track" to traditional advancement. Given the hierarchical nature of most segments of the legal profession, including large law firms and law schools, women lawyers still have limited choices in their struggle to balance professional life with motherhood.<sup>105</sup>

The lifestyle at traditional law firms may not remain attractive to young lawyers, male and female. In fact, life in such an "increasingly commercial

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that the elimination of billable hours "is probably the single most important act any firm can do").

103. See Felice N. Schwartz, *BREAKING WITH TRADITION: WOMEN AND WORK, THE NEW FACTS OF LIFE*, 177 (1992). Schwartz argues further that the policies that discourage women workers to return to work after childbirth are wasting their investments on employee recruitment and training. *Id.*

104. *Id.* at 206. See also Amy Stevens, *More Firms Let Partners Work Only Part-Time*, WALL ST. J., July 10, 1995, at B1.

105. See, e.g., Mark Hansen, *Partners in Name Only: Lawyer's Suit Claims Age, Sex Discrimination Led to Loss of Choice Assignments*, A.B.A. J., Jan. 1992, at 26. See also Sally McConnell-Givet, *The Sexual (Re)Production of Meaning: A Discourse-Based Theory*, in LANGUAGE, GENDER, AND PROFESSIONAL WRITING: THEORETICAL APPROACHES AND GUIDELINES FOR NONSEXIST USAGE 35, 43 (Francine Wattman Frank & Paula A. Treichler eds., 1989).

culture" may be viewed as "inimical to the commitment to public service that is the hallmark of professional identity."<sup>106</sup> Moreover, male and female lawyers may demand change in current law firm expectations in light of the unpredictability of attaining partnership and ever-increasing demands for associate productivity.<sup>107</sup> Restoring the practice of mentoring young lawyers, creating well-rounded generalists and wise counselors, requires time for all lawyers, which is unavailable given the "relentless time pressure [which] mock[s] the aspiration to be more than a technocrat." Marc Gallanter and Thomas Paley have suggested that a lawyer's "human capital" is comprised of skill, expertise, reputation and client good will. As this "capital" develops, the experienced lawyer must employ a young lawyer with little "human capital" but substantial time and energy to assist the senior partner in more efficiently expending his or her capital by serving more clients.<sup>108</sup> This law firm model explains why traditional firms value high numbers of billable hours. Nevertheless, the traditional emphasis on associate billable hours may ultimately be counterproductive to the goal of efficiency as well as inimical to a balanced life for attorneys.

The responsibility and privilege of rearing children should not and need not be viewed as a complete barrier to achieving success as a lawyer. Despite their greater familial commitments at certain points in their professional careers, women lawyers with children still have many years to devote to professional advancement.<sup>109</sup> Appropriate restructuring of law firms could further increase the potential for women lawyers to maximize their lifetime professional contributions.

## CONCLUSION

At first blush, the "mommy-track" promises a perfect arrangement: a compromise between the taxing demands of career and parenthood. However, in the long run, the "mommy-track" solution may deliver much less than it promises. "Mommy-tracking" is a compromise paradigm. It may be

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106. Marc Calanter and Thomas Paley, *The Public Service Implications of Evolving Law Firm Size and Structure*, in *THE LAW FIRM AND THE PUBLIC GOOD* 19, 40 (Robert A. Katzmann ed., 1995).

107. See, e.g. Paul M. Barrett, *Dreary Paper Chase Vexes Legal Rookies*, WALL ST. J., Oct. 21, 1996, at B1 (noting that no more than 10% of large New York law firm associates will become partners, billable hours expectations are in excess of 2,000 hours a year, corporations are moving to in-house counsel, and partners are moving laterally from firm to firm).

108. See generally MARC CALANTER & THOMAS PALEY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 99 (1991).

109. See Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 *FORDHAM L. REV.* 291, 298 (quoting Judge Patricia Wald, Supreme Court Judge of the D.C. Circuit, stating that "[w]ith luck we have a work life of almost 50 years after leaving law school. How can three or four of them be so crucial that we are not allowed a second chance if we don't heave to on the career front twelve hours a day, six days a week in our late twenties and early thirties?").

forced upon women lawyers who lack sufficient facts and insight to make informed judgments about the effects of this decision upon their careers and family lives. Moreover, "mommy-tracking" merely bandages an injury without attacking the systemic cause. Clearly, motherhood limits the ability to succeed in the traditional workplace, as it is presently constructed. Unlike their male counterparts, women lawyers rarely have the benefit of a spouse who enables them to focus almost single-mindedly on their careers by providing childcare and homemaking.

If "mommy-tracking" is to be a viable option, women lawyers cannot be forced to pay the economic costs alone. Admittedly, in an ongoing marriage, the family decision to "mommy-track" will be subsidized by the earnings of the other partner at divorce. To be equitable, the "mommy-tracker" must be compensated for her childrearing contributions. "Mommy-tracking" is not a simple matter of individual choice or significance: it is a family decision which attempts to accommodate both caregiving and career. As a matter of personal choice and practical necessity, the desire to have children must be recognized as an essential element of family life.

Many suggestions have been made for ameliorating the effect of mommy-tracking at divorce. These proposed solutions include adoption of the partnership model of marriage and the abandonment of no-fault regimes in spousal support and property awards.<sup>110</sup> Given the current judicial and societal ambivalence toward working mothers, none of them is likely to be implemented. Moreover, women are unlikely to speak in one voice. Economically dependent women are unlikely to support legal reforms which advance the interests of independent women.<sup>111</sup> The only solution then is to transform dichotomous thinking about the roles of work and family.

The contemporary "mommy-track" debate is a product of highly polarized and politicized views of motherhood. Traditional motherhood is either glorified as the foundation of goodness or condemned as the remaining obstacle to full gender equality. Personal decisions concerning career and family become burdened with political importance. The decision to choose "mommy-tracking" or some other form of economic dependence might be a reasonable choice for women who want children. Nevertheless, their interests may conflict with those of their partners.<sup>112</sup> Some writers have argued that feminism is opposed to family life. They characterize caregiving as post-feminist.<sup>113</sup>

Some argue that the "mommy-track" constitutes "special treatment" for

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110. See generally June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TULANE L. REV. 953 (1991).

111. Mary E. Becker, *Politics, Difference and Economic Rights*, 1989 U. CHI. LEGAL F. 169, 186.

112. *Id.*

113. See generally SYLVIA A. HEWLETT, *A LESSER LIFE: THE MYTH OF WOMEN'S LIBERATION IN AMERICA* (1986).



women. Traditional, full-time workers may argue that their work is subsidizing the work of "mommy-trackers"—that, in effect, the "mommy-track" provides special treatment for women. This could be the other side of the "sameness/difference" or "equal treatment/special treatment" debate.

At the same time, the labels themselves artificially define and conceptualize the issues. The basic unfairness inherent in the "mommy-track" concept becomes clear by examining the structure of the traditional law firm. Law practice is patterned around the traditional male life cycle. The traditional lawyer practices throughout his adult life with no interruptions occasioned by childbirth and childrearing. He is socialized to assume that childrearing is a delegable task. He receives housekeeping and childcare services which enable him to devote his efforts single-mindedly to his practice.

Changing this situation requires profound restructuring of the family and of the workplace in fundamental respects. Treating the "mommy-track" as a viable alternative merely reinforces the status quo as legitimate and equitable. Ultimately, "mommy-tracking" avoids the necessary transformation of family and transformation of workplace which could permit women lawyers to be successful in both. "Mommy-tracking" both results from and perpetuates gender inequality because women, unlike men, still pay the costs of parenthood with their careers.

Creating in women lawyers the belief that the "mommy-track" will permit them to have it all, career and children, deflects attention from the important family and work issues which they must address realistically. The career marginalization of women lawyers results neither from biology nor choice but from the family and workplace institutions, which have resulted from and now reinforce gender inequality.